Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2008
No.

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

vs.

JASMINE DORSEY
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE QUESTIONS

I.

A search warrant permits a search anywhere within the named premises where the items named in the warrant might reasonably be found. When all containers, including such effects as purses, are places within the premises where the contraband might be found, is the search of a personal effect (here a purse dropped to the floor by Respondent) within the scope of the warrant?

II.

The police may detain persons present on the premises when a search warrant is executed so as to allow the full and safe execution of the warrant. Here Respondent dropped a purse when the police "froze" those present. If opening the purse is considered a search of Respondent's person, is that search a part of a permissible frisk for weapons of those present on the premises?

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NOW COMES the State of Michigan, by KYM L WORTHY, *Prosecuting Attorney for the County of Wayne*, and TIMOTHY A. BAUGHMAN, *Chief of Research, Training, and Appeals*, and prays that a Writ of Certiorari issue to review the judgment of the Michigan Court of Appeals, entered in this cause on November 25, 2008, leave to appeal denied by an equally divided Michigan Supreme Court on April 17, 2009.

OPINIONS BELOW

The original opinion of the Michigan Court of Appeals is unpublished, and appears as Appendix A. The order of the Michigan Supreme Court appears as Appendix B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the People to be secure in their persons, houses, and effects against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ....No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of Facts

On April 20th of 2007 Detroit Police Officers executed a search warrant at 2010 Mullane in Detroit for narcotics, firearms "used in conjunction with and to safeguard the illegal drug trade," and evidence of drug possession (R, 4; search warrant). The search warrant was based on a controlled buy made at the premises by a confidential informant with a prior "track record" of successful use (search warrant). The seller—who was not the Respondent (R)—was also described in the warrant as a place to be searched. The executing officers encountered Respondent, Jasmine Dorsey, standing in the living room (R 4). She had a purse on her arm, which she dropped to the ground when an officer "froze" her on his entry into the premises (R 4). Marijuana was found on the dining room floor, and an officer picked up the purse and opened it, finding a firearm (R 4, 14). The district court bound over (R 23-24).

Defense counsel brought a motion to suppress in the trial court, the factual basis for the motion being those facts presented at the examination. The trial court found the search of the purse improper under the Fourth Amendment, and suppressed the evidence, resulting in dismissal of the case (MT, 3-5).

The People appealed. The Michigan Court of Appeals found the search of the purse not to be allowed under the warrant. The panel also found that the police could not examine the purse for safety purposes, saying that "the prosecution has not presented any facts that would have justified a police officer's suspicion that defendant was armed

and dangerous. . . .the police had control of her purse and could have held it until the completion of their search."[1] The People sought rehearing, which was denied on December 30, 2008.

On April 17, an equally divided Michigan Supreme Court denied leave to appeal (3 justices dissenting), on justice recusing, as that justice had issued the ruling below before election to the Supreme Court (See Appendix B).

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[1] At which time they also would have had to *return* it—containing a firearm which could have then used against them—to her.

Reasons for Granting the Writ

I.

A search warrant permits a search anywhere within the named premises where the items named in the warrant might reasonably be found. When all containers, including such effects as purses, are places within the premises where the contraband might be found, the search of a personal effect (here a purse dropped to the floor by Respondent) is within the scope of the warrant.

The present case does not involve a search of the "person" of an individual present on the premises, but rather a personal effect of an individual present on the premises dropped by that individual on command of the police to "freeze," but the Michigan Court of Appeals has considered the case as indistinguishable from a search of the person of an individual present on searched premises. Given that the notion that search warrants for contraband that could be concealed on the person do not permit the search of the persons of people present on the premises arises from *Ybarra v Illinois*,[2] see infra and originally and fundamentally from *United States v Di Re*,[3] and

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[2] *Ybarra v Illinois*, 444 US 85, 100 S Ct 338, 62 L Ed 2d 238 (1979).

[3] *United States v Di Re*, 332 US 581, 68 S Ct 222, 92 L Ed 2d 210 (1948).

because the legal landscape has changed with the decision of this Court in *Wyoming v Houghton*,[4] and finally because a search of personal effects—such as purses—is different than a search of the person (such as pockets), a close examination of these cases is in order.

Di Re is not a search warrant case at all, but an auto-search case. An officer was informed by one Reed that Reed was to buy counterfeit gasoline-ration coupons from one Battita. Battita was followed as he went to the appointed place. When officers approached the auto, Reed had coupons in his hand and said he had received them from Battita, who was sitting in the driver's seat. Di Re was simply a passenger in the vehicle, and the officers had no information regarding him or the auto. Di Re was arrested and searched, and counterfeit coupons found on his person.

This Court held that the search of Di Re was not permissible, for simply because there was probable cause to believe that Battita possessed coupons gave no probable cause to search or arrest Di Re. The opinion, however, contains some unfortunate dicta. The government had *conceded* that a warranted search of premises would not justify a search of persons on the premises, and so the Court reasoned from this concession that an unwarranted search of an auto would not justify a search of all occupants. But the facts of *Di Re* demonstrate that there the officers only had reason to believe that Reed and Battita possessed coupons. To cite the case for the proposition that a private

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[4] *Wyoming v Houghton*, 526 US 295, 119 S C 1297, 143 L Ed 2d 408 (1999).

premises search under warrant will not allow a search of persons on the premises where the items named in the warrant might be found on the person is not justified. More importantly, for purposes here, the case did not involve the search of a personal effect, but of the person of Di Re.

Neither did *Ybarra* involve a search of personal effects, and a further critical factual distinction from the instant case is that it involved a search of patrons of a place of public accommodation, where people wholly unconnected to the premises are expected to be found. The search warrant in *Ybarra* authorized the search of the "Aurora Tap Tavern" and the person of an individual named "Greg" for controlled substances, money, instrumentalities, and paraphernalia used in the manufacture, processing, and distribution of controlled substances. Ybarra was simply a person present in the tavern when the warrant was executed, and was patted down when the warrant was executed, resulting in the discovery of contraband. This Court held that the search of Ybarra could not be justified under the warrant, which gave "no authority whatever to invade the constitutional protections possessed individually by the *tavern's customers*."[5] Thus, the case is distinguishable from the present case in important particulars:

- it involved a place of public accommodation, where the present case involves a private residence;

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[5] 62 L Ed 2d at 246 (emphasis supplied).

- it involved the observation of narcotics only behind the bar; here, someone in the house had sold narcotics to an informant;

- it involved the search of the person of Ybarra, rather than a personal effect dropped upon entry of the police, as here.

The recent case of *Wyoming v Houghton* does, however, involve the search of a personal effect, and is thus critical to the analysis. Police stopped an auto for speeding, and saw a hypodermic syringe in the shirt pocket of the driver. When the driver was asked why he had the syringe, he answered that he used it to take drugs. The passengers were ordered out of the vehicle as well, and the passenger compartment searched for drugs. In the back seat was a purse, which Houghton claimed was hers. The officer searched the purse; in it was a container, and in the container was a syringe and methamphetamine.

There was no contest on the question of whether the police had probable cause to search the car for illegal drugs; the question was whether that probable cause allowed the opening of the purse of a passenger of the vehicle, where the purse was in the vehicle. The Wyoming Supreme Court applied an "ownership"/ "knew or should have known" test to the search of the purse, finding that while ordinarily probable cause will allow a search of all containers where the object of the search might be held or concealed, if the searching officers "know or should know that a container is the personal effect

of a passenger who is not suspected of criminal activity, then the container is outside the scope of the search unless someone had the opportunity to conceal the contraband within the personal effect to avoid detection."[6] Because, said that court, the officer "knew or should have known that the purse did not belong to the driver, but to one of the passengers," and because "there was no probable cause to search the passengers' personal effects and no reason to believe that contraband had been placed within the purse," the search of the purse was unlawful.[7] But this Court disagreed.

After a review of those searches believed reasonable at the time of the ratification of the Constitution, the Court held that a probable-cause based search of a vehicle allows the search of every part of the vehicle and its contents that might conceal the object of the search, in an analysis wholly applicable to warranted searches of premises (indeed, both require probable cause, the difference being that the one requires a warrant while the other does not; but there is no basis on which to rest a different test for the appropriate *scope* of the probable-cause based search of the "premises").

- *"Ross* [*United States v Ross*] concluded from the historical evidence that the permissible scope of a warrantless car search 'is defined by the object of the search and the places

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[6] 956 P.2d 363, 372 (1998).

[7] *Ibid.*

in which there is probable cause to believe that it may be found.'"

- "The same principle is reflected in an earlier case involving the constitutionality of a search warrant directed at premises belonging to one who is not suspected of any crime: 'The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought.' *Zurcher v. Stanford Daily,* 436 U.S. 547, 556, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978).

- "In sum, neither *Ross* itself nor the historical evidence it relied upon admits of a distinction among packages or containers based on ownership. When there is probable cause to search for contraband in a car, it is reasonable for police officers-like customs officials in the founding era-to examine packages and containers without a showing of individualized probable cause for each one. A passenger's personal belongings, just like the driver's belongings or containers attached to the car like a glove compartment, are "in" the car, and the officer has

probable cause to search for contraband *in* the car."

- "...[regarding] the degree of intrusiveness upon personal privacy and indeed even personal dignity—the two cases the Wyoming Supreme Court found dispositive differ substantially from the package search at issue here. *United States v. Di Re,* 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948), held that probable cause to search a car did not justify a body search of a passenger. And *Ybarra v. Illinois,* 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979), held that a search warrant for a tavern and its bartender did not permit body searches of all the bar's patrons. These cases turned on the unique, significantly heightened protection afforded against searches of one's person.....Such traumatic consequences are not to be expected when the police examine an item of personal property found in a car."

- [In response to the dissent]"[The dissent attributes the holding in *Di Re*] to 'the settled distinction between drivers and passengers,' rather than to a distinction between search of the person and search of property, which the dissent claims is 'newly minted' by today's opinion. . . .Justice Jackson's opinion in *Di Re*. . .makes it very clear

that it is *precisely* this distinction between search of the person and search of property that the case relied upon. . . .Justice Jackson was. . .referring *precisely* to that 'distinction between property contained in clothing worn by a passenger and property contained in a passenger's briefcase or purse; that the dissent disparages, *post,* at 1305. This distinction between searches of the person and searches of property is assuredly *not* 'newly minted'...."

- "Effective law enforcement would be appreciably impaired without the ability to search a passenger's personal belongings when there is reason to believe contraband or evidence of criminal wrongdoing is hidden in the car. . . .a car passenger-unlike the unwitting tavern patron in *Ybarra*-will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing....A criminal might be able to hide contraband in a passenger's belongings as readily as in other containers in the car, . . .perhaps even surreptitiously, without the passenger's knowledge or permission."

- "To be sure, these factors favoring a search will not always be present, but

> the balancing of interests must be conducted with an eye to the generality of cases. To require that the investigating officer have positive reason to believe that the passenger and driver were engaged in a common enterprise, or positive reason to believe that the driver had time and occasion to conceal the item in the passenger's belongings, surreptitiously or with friendly permission, is to impose requirements so seldom met that a 'passenger's property' rule would dramatically reduce the ability to find and seize contraband and evidence of crime.'"[8]

A search warrant is, after all, an anticipatory authorization to search. Just as officers cannot foresee the existence of closets, cupboards, desks, nightstands, and the like, neither can they always foresee the existence of personal effects such as briefcases and purses belonging to persons present on the premises, who may have either an interest in the items to be seized or an interest in frustrating the warrant. Where the warrant clause has been satisfied and probable cause to search private premises determined by a neutral judicial officer, a search of reasonable intensity for the sought-after items is permitted. That search should include the personal effects of persons on private premises where the items

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[8] *Wyoming v. Houghton*, 526 U.S. 295 at 302-307, 119 S.Ct. at 1301 - 1304.

named in the warrant could be concealed in those effects.

The existence of knock and announce requirements also demonstrate that searching personal effects on premises where those effects could contain the items named in the warrant is reasonable. Knocking and announcing is required by both statute[9] and the Constitution,[10] and is forgiven only if there is already a reasonable fear of frustration of the warrant, or danger to the officers.[11] Obviously, then, it would be a simple matter for a person present in the premises, on hearing the police knock and announce, to pick up the item named in the warrant put it in his or her pocket, where the item—such as cocaine, or a firearm—is easily concealed in a pocket. Surely the purpose of a warrant—a judicial command—should not be frustrated by such facile maneuvers.

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[9] MCL780.656.

[10] *Wilson v Arkansas*, 514 US 927, 115 S Ct 1915, 131 L Ed 2d 976 (1995).

[11] *Richards v Wisconsin*, 520 US 385, 117 S Ct 1416, 137 L Ed 2d 615 (1997). Though no longer will any exclusionary sanction be applied for violation of knock and announce principles, see *Hudson v Michigan*, ··· U.S. ····, ····, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006); *People v Stevens*, 460 Mich 626 (1999), the requirements nonetheless govern, and violation is a constitutional violation, subjecting the police and municipalities to civil liability.

This Court in *Houghton* rejected any "relationship to the premises" test for the searching of containers which could contain items sought on probable cause. That rule, followed by the Wyoming Supreme Court in that case and by other courts,[12] that the police, although armed with a warrant, "may search an individual's personal effects found on premises only if they know at the time of a close relationship between the person and the premises"[13] is and always was unsound. As one federal judge put it over three decades ago, "When the stranger in the betting parlor solemnly announces that he is the family doctor, I am less sure than is the court that I would require police to believe him—or inquire further before searching his bag."[14] To paraphrase *Houghton* so as to apply it to the search of a dwelling—and though there may be less of a privacy concern with automobiles, that lesser privacy interest means that fewer foundational facts are required to show probable cause, and does not go to the permissible scope of the search, and, more importantly, that search is made without a warrant, unlike the search of premises here—"In sum, neither *Ross* itself nor the historical evidence it relied upon admits of a distinction among packages or containers based on

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[12] See e.g. *United States v. Micheli,* 487 F.2d 429 (C.A.1, 1973).

[13] See e.g. *United States v. Micheli,* 487 F.2d 429, 433 (C.A.1, 1973)(concurring opinion).

[14] See e.g. *United States v. Micheli,* 487 F.2d 429 (C.A.1, 1973)(concurring opinion).

ownership. When there is probable cause to search for contraband in a [dwelling, on a warrant issued on probable cause], it is reasonable for police officers—like customs officials in the founding era—to examine packages and containers without a showing of individualized probable cause for each one. A [person present on the premises's] personal belongings, just like the [owner's] belongings or containers attached to the [dwelling] like a [closet], are "in" the [dwelling], and the officer has probable cause to search for contraband *in* the [dwelling]."[15]

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[15] See also *People v. Coleman*, 436 Mich. 124, 126 (1990) upholding a search of a purse during the execution of a search warrant in a dwelling where "The purse was not on the defendant's person, under her control, or in proximity to her person during execution of the warrant," being found on a nightstand. Here the purse was on defendant's person when the police entered, but she dropped it—quite likely to try to avoid connection to the firearm discovered in it—but her "proximity" to the purse does not change the fact that it was a container on the premises—and one not on her person at the time of its search or even taken from her—which could have contained the items sought. And see *Commonwealth v. Reese*, 549 A.2d 909, 909 (Pa.,1988) upholding the search of a jacket found on a chair in an apartment, belonging to a visitor to the apartment, as included within the scope of a warrant to search the apartment for drugs and other contraband.

II.

The police may detain persons present on the premises when a search warrant is executed so as to allow the full and safe execution of the warrant. Respondent dropped a purse when the police "froze" those present. If opening the purse is considered a search of Respondent's person, that search is a part of a permissible frisk for weapons of those present on the premises.

It is now clear that officers executing a search warrant may, to ensure the full and safe execution of the warrant, ordinarily detain all present on the premises for the time necessary to complete the search, including using handcuffs to control the situation. The initial case so holding was *Michigan v Summers*.[16] Though noting that nothing in the record concerning the execution of the warrant suggested any "special danger" in the particular warrant execution before the Court, this Court noted not only the reasonably minimal nature of the intrusion of the detention, but that "the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the

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[16] *Michigan v Summers*, 452 US 692, 101 S Ct 2587, 69 L Ed 2d 340 (1981).

situation."[17] And in *Muehler v Mena*[18] this Court held that "Inherent in *Summers'* authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention,"[19] upholding detaining Mena in handcuffs while the warrant was executed. In light of these statements and holdings, the holding of the Michigan Court of Appeals that the People had "failed to create an evidentiary record that would persuade us that the circumstances surrounding the execution of the search warrant constituted a dangerous situation" so as to justify the frisk of anyone present during the execution of the warrant fails to confront the People's argument that an *individualized* showing is unnecessary, and is inconsistent with *Summers* and *Mena*,

If the search of the purse here is viewed as a search of the person of the Respondent—though she had dropped it to the ground—rather than a search of containers found in the premises being searched under warrant, then that search was permissible to ensure the safety of the officers. As noted in *Summers*, "the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to

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[17] *Summers*, 452 U.S. at 703, 101 S.Ct. at 594.

[18] *Muehler v Mena*, 544 US 93, 125 S Ct 1463, 161 L Ed 2d 299 (2005).

[19] *Muehler*,544 U.S. at 98-99, 125 S.Ct at 1470 (2005).

both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." And one object of the search warrant here was firearms. Respondent was not charged with any drug offenses here, and at the end of the search her purse—which turned out to contain a lethal firearm—would have been returned to her, demonstrating the folly of the holding of the Michigan Court of Appeals. Checking the purse for a weapon was only reasonable under these circumstances.

This question has been addressed in various jurisdictions, without unanimous result. For example, in *State v Guy*[20] the Wisconsin Supreme Court upheld a frisk accompanying a search warrant execution for narcotics:

> Officer Zarse frisked the defendant while Zarse was executing a search warrant for cocaine. "[T]he execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence...." *Michigan v. Summers,* 452 U.S. 692, 702, 101 S.Ct. 2587, 2594, 69 L.Ed.2d 340 (1981). A magistrate had found probable cause to believe that cocaine trafficking was taking place in the residence in which officers found the defendant. Officer Zarse knew this. ...Zarse knew that if the defendant was not arrested she would eventually be released from the handcuffs. Zarse had also executed about 150 search warrants for drugs.

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[20] *State v Guy*, 492 N.W.2d 311 (1992).

> Officers can draw reasonable inferences from the facts in light of their experience. *Terry*, 392 U.S. at 27, 88 S.Ct. at 1883; *see also Harris*, 95 N.C.App. at 697, 384 S.E.2d at 53. A reasonably prudent officer in Zarse's position would be justified in believing her safety was in danger....One of the reasons this belief would be reasonable is that weapons are often "tools of the trade" for drug dealers. *See, e.g., United States v. Oates*, 560 F.2d 45, 62 (2d Cir.1977). This court has recognized that "[t]he violence associated with drug trafficking today places law enforcement officers in extreme danger."[21]

And in *Dashiell v State*[22] the Maryland Supreme Court held that where the search warrant includes as an object of the search firearms or other weapons, this provides sufficient articulable suspicion to frisk those inside the premises.[23]

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[21] *Guy*, at 315. See also *Hayes v Commonwealth*, 514 S.E.2d 357 (Va App, 1999), assuming a frisk is proper under these circumstances, but finding the proper scope of the frisk exceeded under the facts.

[22] *Dashiell v State*, 821 A.2d 372 (Md, 2003).

[23] See similarly *People v Thurman*, 257 Cal Rptr 517, 520 (Cal App, 1989), upholding frisk during execution of narcotics warrant because the undertaking is "fraught with the potential for

On the other hand, in *Denver Justice and Peace Committee v City of Golden*[24] the court rejected the argument that a frisk may *always* accompany a warrant execution, finding a frisk impermissible where the nature of the warrant gives no reason to believe any danger exists (there, for pamphlets, flyers, posters, photographs, and membership lists, in an investigation of a vandalism incident). Other cases similarly restrict frisks depending on the nature of the warrant.[25]

Here the search warrant was for drugs and for firearms "used in conjunction with and to safeguard the illegal drug trade," after controlled buys were made from the premises. If the search of the purse Respondent dropped on the floor is viewed as a search of the person rather than a search of containers found in the premises which might contain the items sought, then a frisk of Respondent's person—and the purse—was permissible.

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sudden violence"); *State v. Alamont*, 577 A.2d 665 (R.I.1990); *State v Trine*, 673 A.2d 1098 (Conn, 1996); *State v Taylor*, 612 N.E.2d 728 (Ohio App, 1992); *State v Curtis*, 964 S.W.2d 604 (Tenn. Crim. App 1997); *United States v Proctor*, 148 F.3d 39 (CA 1, 1998).

[24] *Denver Justice and Peace Committee v City of Golden*, 405 F.3d 923 (CA10, 2005).

[25] See e.g. *Leveto v. Lapina*, 258 F.3d 156 (CA 3, 2001); *United States v. Ward*, 682 F.2d 876 (CA 10,1982).

But if a frisk of the Resondent was permissible, the question becomes whether a frisk extends to looking into a personal effect held by the person at the time. Professor LaFave has discussed the analogous (though not perfectly so) situation of "ordinary" frisks (that is, outside of the context here, frisks during execution of search warrants):

> Assuming circumstances in which an officer would be justified in frisking a person for a weapon, may he likewise examine the contents of items carried by that person, such as a purse, shopping bag, or briefcase? Most commentators have answered this question in the negative, reasoning that the officer can effectively protect himself from any risk arising from the fact that such an item might contain a weapon by simply putting it out of the person's reach during the period of the encounter, *except of course when the container must be returned to the suspect* for some purpose (e.g., locating identification) during that period.... There is much to be said for this position, provided that it is recognized that *there may exist circumstances in which the officer might "reasonably suspect the possibility of harm if he returns such objects unexamined" and that in such circumstances the officer must be allowed to "inspect the interior of the item before returning it*.....The cases on the subject, however, have in the

> main not followed the view of the commentators.[26]

Here, where the encounter occurred during the execution of a search warrant, with one class of items to be sought being firearms, and with the purse to be returned to the Respondent at some point (assuming no grounds for her arrest arose, and again, assuming the purse may not be searched under the authority of the warrant), an officer might "reasonable suspect the possibility of harm" if he returned the purse "unexamined," so that inspection of "the interior of the item before returning it" was permissible, even under Professor LaFave's view. And as Professor LaFave notes, "the cases on the subject...have in the main not followed the view of the commentators," but have more *broadly* viewed the authority of the police.

Conclusion

"The execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." When the police executed the search warrant here they gained control over the premises immediately by "freezing" those present, as was their right. Respondent dropped her purse to the ground. An officer looked into that purse and found a firearm. Either because that search was of a

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[26] 4 LaFave, *Search and Seizure* (4th Edition), § 9.6 (e) (emphasis supplied).

container in the premises where the items named in the warrant could be found, or because the opening of the purse was a proper protective frisk, or both, the gun was admissible.

Relief

Wherefore, the Petitioner requests that certiorari be granted.

Respectfully submitted,

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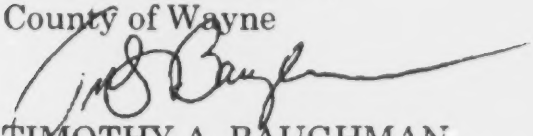
Prosecuting Attorney
County of Wayne



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Appendix A: Court of Appeals Opinion
Court of Appeals of Michigan.

Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellant,
v.
Jasmine DORSEY, Defendant-Appellee.

Docket No. 280524.

Nov. 25, 2008.

Wayne Circuit Court; LC No. 07-009874.

Before: MURPHY, P.J., and SAWYER and SMOLENSKI, JJ.

PER CURIAM.

The prosecutor appeals as of right from the trial court order granting defendant's motion to suppress evidence found in her purse during the execution of a search warrant. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This Court is limited in its review to the lower court record. MCR 7.210(A)(1). Because the search warrant and affidavit in support of the search warrant were not part of the lower court record, this Court may not consider these documents and is unaware of the object of the search warrant. However, police testimony indicated that the "seller" described in the search warrant was a male, which plainly did not describe defendant.

Upon entry into a private home while executing a search warrant, police officers found defendant and two other women in the living room. While complying with the police order to freeze, defendant dropped her purse at her feet. An officer found an undisclosed amount of marijuana in the dining room while another officer searched defendant's purse and found an unloaded nine-millimeter gun. Testimony indicated that the police had no idea how long defendant had been at the home. Defendant was charged with carrying a concealed weapon, MCL 750.227. The trial court granted defendant's motion to suppress the gun and her subsequent motion to dismiss the charge.

The prosecution first argues that cases prohibiting the search of a person merely present on the premises where a search warrant is executed are distinguishable from the facts of this case where a personal effect, the purse, was searched. See *Ybarra v. Illinois,* 444 U.S. 85, 90-93, 96, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979); *People v. Hawkins,* 163 Mich.App. 196, 198, 413 N.W.2d 704 (1987); *People v. Burbank,* 137 Mich.App. 266, 269-270, 358 N.W.2d 348 (1984) (the search of a person found on premises subject to a search warrant must be supported by probable cause particularized to that individual). The issue becomes whether defendant's purse can be considered an extension of her person.

In a similar case, but with relevant factual distinctions, involving the search of a purse belonging to a defendant who was present in a home covered by a search warrant, *People v.*

Coleman, 436 Mich. 124, 461 N.W.2d 615 (1990), our Supreme Court found that the defendant's purse was not an extension of her person, and therefore was properly searched, because of several factors that are not present here: (1) the purse was found in a private area of the home, (2) the defendant was positioned in a place where it appeared she was concealing evidence, (3) the defendant appeared to have more control over the premises than a casual visitor, (4) the purse was several feet away from the defendant and not in her control, and (5) the facts showed that the defendant had a special relationship to the person named in the warrant. *Id.* at 133-136, 461 N.W.2d 615. By contrast, in this case: (1) the purse was found at defendant's feet where she dropped it upon being ordered to freeze by police; (2) defendant and the purse were in a common area of the home, near the entry; (3) there was no evidence that defendant had any knowledge of the marijuana found in the dining room; (4) there was no evidence suggesting that defendant had more control over the premises than a casual visitor; and (5) there was no evidence that defendant had a special relationship to the person or the home identified in the warrant. Because the facts here are clearly distinguishable from the facts in *Coleman,* we conclude that defendant's purse was an extension of her person and therefore improperly searched under the holdings in *Ybarra, Hawkins,* and *Burbank,* as well as *Coleman.*[FN1]

FN1. We, therefore, do not consider the prosecution's argument that the holding in *Wyoming v. Houghton,* 526 U.S. 295, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999), should

> be extended to the facts of this case. We note, however, that because the search warrant was not made part of the lower court record, we cannot consider the object of the search permitted by the warrant attached to the prosecutor's appellate brief.

The prosecutor next argues that the search of the purse was permissible as a *Terry* frisk of defendant's person. Under the holding in *Terry v. Ohio,* 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), an officer may conduct a reasonable search of a person where the officer has reason to believe he is dealing with an armed and dangerous individual. However, the prosecution has not presented any facts that would have justified a police officer's suspicion that defendant was armed and dangerous. She was merely present at a home that was the object of a search warrant. See *Ybarra, supra* at 92-93. Defendant also was in a central location within the home with no visible access to weapons, she had obeyed the police command to freeze, and the police had control of her purse and could have held it until the completion of their search. See *People v. Stewart,* 166 Mich.App. 263, 420 N.W.2d 180 (1988).

The prosecutor has simply failed to create an evidentiary record that would persuade us that the circumstances surrounding the execution of the search warrant constituted a dangerous situation in which the police would be reasonably suspicious that anyone merely present in the home would be armed and dangerous. Despite our genuine concerns regarding officer safety in executing

search warrants, *Coleman, Ybarra, Terry,* and the other cases cited herein mandate suppression on the record provided. Therefore, we find that the trial court did not err in its decision to suppress the evidence found in defendant's purse.

Affirmed.

Appendix B: Opinion of the Michigan Supreme Court

April 17, 2009

SC: 138042
COA: 280524
Wayne CC: 07-009874

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

JASMINE DORSEY,
Defendant-Appellee.
_____/

On order of the Court, the application for leave to appeal the November 25, 2008 judgment of the Court of Appeals is considered, an it is DENIED, there being no majority in favor of granting leave to appeal.

MARKMAN, J. (*dissenting*).

I respectfully dissent and would grant leave to consider the issues presented here.

When the police executed a search warrant for drugs at a house, they found three women sitting on a couch in the living room. After the police directed the women to "freeze," defendant raised her arms and dropped her purse to the floor by her

feet. Although no drugs were found in the living room where defendant was situated, a small amount of marijuana was found in the dining room. The police also searched defendant's purse and found an unloaded handgun for which defendant lacked a permit.

In *Ybarra v Illinois*, 444 US 85 (1979), the Court held that a search of a customer at a bar while the police were executing a search warrant at the bar was illegal. The Court explained:

> [A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. . . . [A] search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. [*Id.* at 91.]

Further, "[t]he 'narrow scope' of the *Terry* [*v. Ohio*, 392 US 1 (1968)] exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place." *Id.* at 94.

In light of *Ybarra,* the police in this case lacked the authority to search defendant's person. However, the United States Supreme Court has distinguished between a search of a person and a search of a person's purse. In *United States v Di Re,* 332 US 581 (1948), the Court held that probable cause to justify a search of a car does not justify a search of the passengers of the car. Subsequently, in *Wyoming v Houghton,* 526 US 295 (1999), the Court held that probable cause to justify a search of a car *does* justify a search of a passenger's purse. The Court held that an item of personal property, like a purse, is not entitled to the "significantly heightened protection afforded against searches of one's person." See *id.* at 303 (distinguishing *Di Re* and *Ybarra*). In response to the dissent that criticized the majority for making a distinction between a search of a person and a search of a person's purse, the majority said:

> Does the dissent really believe that Justice Jackson [in *Di Re*] was saying that a house search could not inspect *property* belonging to persons found in the house—say a large standing safe or violin case belonging to the owner's visiting godfather? Of course that is not what Justice Jackson meant at all. He was referring *precisely* to that "distinction between property contained in clothing worn by a passenger and property contained in a passenger's briefcase or purse" that the dissent disparages. This distinction between searches of the

> person and searches of property is assuredly *not* "newly minted . . . ." [*Id.* at 303 n 1 (emphasis in the original).]

The United States Supreme Court has further held that "[s]earch warrants are not directed at persons; they authorize the search of 'place[s]' and the seizure of 'things . . . .'" *Zurcher v Stanford Daily,* 436 US 547, 555 (1978). Therefore, "it is untenable to conclude that property may not be searched unless its [owner] is reasonably suspected of crime and is subject to arrest." *Id.* at 559.

In *People v Coleman,* 436 Mich 124 (1990), this Court held that the search of the defendant's purse did not amount to a search of the defendant's person. In that case, the purse was across the room from the defendant and the defendant was not a "mere casual or transient visitor who happened fortuitously to be on the premises at the time it was subject to a lawful search." *Id.* at 135 (Boyle, J., concurring). Defendant was eventually charged with carrying a concealed weapon without a permit. The trial court suppressed evidence of the gun, ruling that the search was illegal, and the Court of Appeals affirmed. *People v Dorsey,* unpublished opinion per curiam of the Court of Appeals, issued November 25, 2008 (Docket No. 280524). The prosecutor argues before this Court that because the purse was not on defendant's person when the police seized it, the purse could be searched because it constituted personal property inside a house that was the subject of a valid search warrant. That is, the search constituted a permissible search of a container in which items

specified in the warrant might be found. Because this is a jurisprudentially significant issue, and because the prosecutor has raised thoughtful arguments, I would grant leave to appeal.

CORRIGAN and YOUNG, JJ., join the statement of MARKMAN, J.

HATHAWAY, J., not participating. Justice Hathaway recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

_____

Clerk
April 17, 2009

"6.01.1063

STATE OF MICHIGAN
COUNTY OF WAYNE SS

SEARCH WARRANT AND AFFIDAVIT

APPENDIX .C 22

TO THE SHERIFF OR ANY PEACE OFFICER OF SAID COUNTY P O LaMar Penn #1024

Affiant having subscribed and sworn to an affidavit for a search warrant, and I, having under oath examined the affiant, am satisfied that probable cause exists

THEREFORE, IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN, I COMMAND THAT YOU SEARCH THE FOLLOWING DESCRIBED PLACE the entire premises and curtilage of 2010 Mullane This location is described as a 2 story, single family, multi-unit side by side brown brick dwelling w/ its own address This location is between Senator and Navy, on the east side of the street 2010 Mullane is located in the City of Detroit, County of Wayne and State of Michigan

Also to be searched is the SELLER B/M/19-21 years old, 5'9" 175lbs, medium compl , w/a tear drop under under right eye,

and to seize, secure, tabulate, and make return according to the law, the following property and things All controlled substances, all monies, books and records used in the connection with illegal trafficking equipment and supplies used in the manufacture, delivery or sale of controlled substances, all firearms used in the connection with the above described activities, all evidence of ownership, occupancy, possession or control of the premises And all other property related to narcotics trafficking, to include firearms used in conjunction with and to protect or safeguard the illegal drug trade

The following facts are sworn to by the affiant in support of the issuance of the warrant

Affiant is a sworn member of the Detroit Police Department, currently for over nine (9) years Affiant is currently assigned to the Narcotics Division Affiant is conducting an investigation into the sales of illicit drugs at 2010 Mullane working in conjunction with other members and SOI #2149 SOI #2149 has been used by affiant or members of the Narcotics Division on at least (5) occasions resulting in the arrests of at least (4) persons for narcotic and related offenses with at least three (3) convictions and cases still pending in both 3rd Circuit and 36th District Courts

On April 19 2007, affiant met with SOI #2149 The SOI was searched for drugs and money with none being found The SOI was issued a quantity of Funds and instructed to attempt a purchase of illicit drugs at 2010 Mullane The SOI was then observed to go directly to and enter the front door The SOI stayed for approximately two minutes or less, then returned directly to affiant The SOI turned over a quantity of suspected cocaine to affiant The SOI stated the cocaine was purchased from the SELLER inside of the above location The SOI was again searched for drugs and money, with none being found Affiant transported the suspected cocaine to Narcotics Division Offices for analysis P O Dekun tested the evidence The analysis showed positive for the presence of cocaine The suspected cocaine was then placed into LSF#N03011905

Wherefore, affiant believes that 2010 Mullane is the site of an ongoing illicit drug enterprise Affiant believes that illicit drugs and related evidence will be found at the location and seeks to remove same

Affiant

Subscribed and sworn to before me and issued under my hand this 20th day of April, 2007

via phone Sarah De Young
Assistant Prosecuting Attorney
P63043

Judge/Magistrate of Wayne County Michigan

11A

APPENDIX C: SEARCH WARRANT[27]

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[27] The Michigan Court of Appeals opinion contains some odd dicta. The panel, in footnote 1 stating, after finding *People v Coleman*, infra, which concerned the search of a purse in a bar searched under warrant, distinguishable,"We, *therefore*, do not consider the prosecution's argument that the holding in *Wyoming v Houghton*. . . should be extended to the facts of this case." In other words, because of its finding that *Coleman* was distinguishable by holding that the purse in this case was an extension of Respondent's person, the court did not further discuss the People's argument ("therefore") under *Houghton*. Strangely, the footnote also states that "because the search warrant was not made part of the lower court record, we cannot consider the object of the search permitted by the warrant attached to the prosecutor's appellate brief." Given the court's statement that it was *because of* the factual distinctions it found between the present case and *Coleman* that the *Houghton* argument would not be discussed, this statement is gratuitous, and dicta. Further, the "object of the search" is clear given the references in the record to the "seller" being described in the warrant, and, if believed necessary, this Court may do that which the Michigan Court of Appeals should have—take judicial notice of the search warrant (Appendix C). It is clear that the defense had a copy of the search warrant and everyone understood what the objects of the search were. As a *court order* (and one attached by the People to their brief, and appended to this petition), the search warrant may be judicially noticed by this Court, this

petition being a part of the direct appeal (see FRE and MRE 201(e), providing that "judicial notice may be taken *at any stage of the proceeding*"; further, notice may be taken "whether requested or not." FRE and MRE 201(c)). As stated in *Michigan Court Rules Practice: Evidence* § 201.4, p. 98, "Judicial notice is frequently taken of files and records. A court has the inherent power to take judicial notice of its own records and files, *as well as the records and files of cases in other jurisdictions.*" Certainly the search warrant attached to the Peoples pleadings is "not reasonably subject to dispute," and may be considered by this Court